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ABSTRACT

The issue of the proper role of government in the censorship of sexually explicit material is analyzed in this article from a symbolic interactionist view of communication and traditional principles of constitutional liberty. The paper focuses on the Supreme Court's adjudication of obscenity cases and proposes a set of principles consistent with the United States Constitution as an alternative framework for such adjudication. Major sections of the article detail the communication perspective, current principles of adjudication used in obscenity cases (especially the case of "Miller vs. California"), and an alternative framework for such adjudication. The alternative framework is based on the view that obscenity ought to be abandoned as a legal concept and that instead courts should apply principles used in other cases involving offensive communication and fundamental rights. Two broad postulates are suggested: (1) the government should disallow state action that creates a substantial ban aimed at communication content; and (2) in certain narrowly defined circumstances in which other fundamental rights are endangered, the government should have some power to regulate communication selectively in order to maintain the system of liberty. (Author/GW)

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Conflicting Compelling Interests:

Notes Toward a Communication Approach to Censorship of Sexually Explicit Material

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Introduction

This article uses the concept of communication as the basic theoretical background from which to analyze the continuing debate over the role of government in the censorship of sexually explicit material. It focuses on the Supreme Court's adjudication of obscenity cases and proposes a set of principles consistent with the United States Constitution as an alternative framework for such adjudication. The focus on sex censorship is appropriate because it leads to the very core of the nature of man and his relationship to his government, and because the Court has been unsuccessful in its attempts to develop a consistent set of constitutional principles of adjudication in the area.

The Concept of Communication

This article views communication as the basic social process, the process through which people continuously recreate themselves and their societies. Communication originates in the process of symbolic thinking wherein humans are able to isolate certain aspects of their environments, concentrate on them and assign them meanings. This activity is endemic to social life, and enables men to control their responses to their environments and manipulate them in ways which enhance survival.

Two aspects of the human communication process are especially important here: it is both active and social. It is active in that men impose meaning and value on elements of their environment; men must actively participate in constructions of reality of fall back into the reflex-response existence of other beings. The active quality of human communication presupposes an environment encouraging reflexive and creative activity.

Communication is social in that men develop mind and humanness in interaction with others. Communication requires participation in reality construction,

and the propensity for its reconstruction to meet changing human needs. Communicating beings are compounds of individual and social reality; each person is the product of a continuous interactive relationship between society and his own creative consciousness. At the same time he is both alone and immersed in a continuous set of human relationships which maintain his humanity. In and through the creative experience of communication, men cope with this dual nature; they continually create and test their own conceptions of reality and thereby participate in the collective decisioning process.

One of the products of the communication process is the creation of the social order wherein people provide for themselves the continuity and stability necessary for the organization and direction of ongoing society. This habituation, or "institutionalization," allows people to develop patterns of behavior and thus benefit from cumulative experience and carry on further social experimentation. Though most institutionalized ways of behaving are informal, some attain formal and codified status. Often the most institutionalized aspects of a society are its governmental structures and the laws contained in them.

The communicational relationship of individuals and their government is illuminated by the political and social philosophy of John Dewey, which stresses the communicative nature of democratic government. According to Dewey's view, people derive their citizenship in democratic government through their participation in the collective creation and use of the meanings and goods of the society. Thus, democracy, and education for it, requires an environment of social experimentation, i.e., a communicational environment encouraging social inquiry and creative participation. The social institution of government must reflect this requirement; it must maintain the creative social environment, and its laws must be continually reappraised and revitalized to adjust them to the needs of the social system.

The private and public dimensions of the communication process further

illuminate the proper relationship of individuals to their government. Private communication involves rather specific, intinate and largely self-determined personal relations and is exemplified by intrafamily relations. Public communication involves more general, institutionalized, and largely pre-determined formal communication and is exemplified by the relations of individuals to their government. Private relations are considered the source and staging area for mature participation in the communication process, while public relations provide the cultural background, social cooperation and individual protection necessary for maintenance and continued growth of all the people in the system. In this scheme, private relations are considered primary while others are considered secondary or ancillary, with the government being the most institutionalized of the latter type.

Legal Protection of Communication

This article views the system of liberty initiated in the Constitution and evolved in the interpretations of it by the Supreme Court as the major social institution in this society which protects the process of communication. Further, the principles applied by the Court in several other areas involving fundamental liberty which are consistent with the process of human communication suggest the proper framework for the adjudication of cases involving sexually explicit material.

This framework begins with the founding documents of the United States which posit the communicational activity of citizens as the operational principle of the social order. The Declaration of Independence and the Constitution respect the right and capacity of men to govern their own affairs, i.e., to create, use and change their government to reflect their desires and needs. The new government created a system of ordered liberty bestowing on individuals the rights of thought and action in order that truth and self-determination could prevail, and the corresponding responsibility to respect the rights of others in order to

establish equal liberty for all.

The founding fathers thus instituted a system with broad protections of the process of human communication. The First Amendment of the Constitution, for example, specifically prohibits government abridgement of the rights to believe, speak, publish and assemble. Other provisions provide for election of leaders, strict separation of powers and direct limitations on the extent of public power. These and other such provisions protect both individuals and the social system. From the standpoint of individuals, they protect the opportunity for people to become human and to act humanly in society. From the standpoint of the social order, they protect the process of social participation which keeps the society viable.

The Constitutional History of Obscenity

The notion that some sexually explicit material is obscene and thus can be suppressed by government action has had a tortuous history in United States courts. Following the common law of Victorian England which presumed that such material tended to corrupt the morals of youth, United States courts generally upheld government suppression through the first half of the twentieth century. The United States Supreme Court did not directly decide on the issue until 1957, although scattered dicta of earlier decisions indicated support for such suppression. In its earliest decision, the Court rejected complete suppression of such material but left open the possibility of its regulation. The landmark Roth decision declared that obscenity had no social value and therefore did not require constitutional protection. To protect non-obscene material, the Court fashioned the first of a long series of definitions of obscenity predicated on its dominant theme and on community standards of prurience.

In the years that followed the issue generated judicial discord some members of the Court considered unparalled in constitutional adjudication and a jumble of precedent barely comprehensible to those affected by the law. The core of

the problem has been the insistence by majorities of the Court that obscenity is outside the protection of the Constitution, and the resultant concentration on definitions of obscenity rather than on the rights of individuals and the needs of the society.

A majority of the current Supreme Court, under a system of adjudication announced in the 1973 Miller and Paris decisions, allows government suppression of sexually explicit material judicially determined obscene under a definition of obscenity presented in Miller. Doing so, the Supreme Court continues the primary problem of such adjudication.

The Alternative Framework

The primary assertion of this article is that the Supreme Court should consider sexually explicit communication within the constitutional protections of liberty and apply principles tested in other areas involving substantive rights. In this way the Supreme Court could avoid the definitional approach, protect the rights of all citizens and enhance its stature as the legal guardian of the constitutional system of liberty.

The process of human communication and the Constitution indicate two broad postulates for adjudicating obscenity cases: (1) the government should disallow state action which creates a substantial ban aimed at communication content; and (2) in certain narrowly defined circumstances where fundamental rights are endangered, the government should have some power to regulate communication selectively in order to maintain the system of liberty. As demonstrated below, these two postulates undergird the Supreme Court decisions in other areas involving substantive rights, especially under the First Amendment, and provide a suitable framework for cases concerning sexually explicit material. From the standpoint of communication, postulate one protects the possibility of the human social activity which allows individuals to become human and the society to remain viable, and postulate two allows the society

to keep individuals within bounds which maintain the system of human communication. From the standpoint of the Constitution, postulate one protects the legal right of individuals to participate in the social/political process, and postulate two protects the system which makes that participation possible. Taken together, the opportunity to participate in the social process is assumed as a basic right of each individual in the society, but the society maintains the power of selective regulation in order to insure that exercise of individual rights do not infringe on similar exercise by others.

The following sections view the adjudication of obscenity in light of these postulates and the social and legal principles which undergird them. First, a summary and critique of the principles now imposed by the Supreme Court in obscenity cases, as evidenced by the majority opinions in the important 1973 cases. Then, a presentation of the principles applied in other areas affecting fundamental rights and illustration of their use in obscenity cases.

The Current Principles of Adjudication

The 1973 Decisions

The important 1973 decisions, principally Miller v. California[1] and Paris Adult Theatre I v. Slaton,[2] reaffirmed the holding of Roth v. United States[3] that obscene material is not protected by the First Amendment. Speaking through Chief Justice Warran Burger, the majority also reformulated the Roth test for determining obscenity, dividing it into three parts:

> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest...;" (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[4]

The test requires that laws, as written or construed by the courts, impose specific standards and that these be limited to "representation or descriptions of ultimate sexual acts, normal or preverted, actual or simulated" or "of

masturbation, excretory functions and lewd exhibition of the genitals."[5] Miller involved a conviction for mailing unsolicited sexually explicit material, presenting an issue of nonconsensual intrusion of offensive material into one's enclave of privacy. But Paris extended the issue, affirming a conviction under the Miller standard, to an adult's fully informed and consensual access to such material. The Court thus limited Stanley v. Georgia,[6] a 1969 case invalidating a state statute prohibiting the possession and private use of such material, to its facts.

Miller allows censorship whenever the allegedly obscene material is without "serious value."[7] Furthermore, the test relies on local standards of prurience, which permit varying constitutional standards across judicial jurisdictions.[3] At base then, the Supreme Court's present position regarding the circulation and use of sexually explicit materials relies on local community and judicial standards of social value. That criterion of serious social value is a fatal flaw.

Generally accepted empirical evidence does not clearly support the assertion that sexually explicit material is without value.[9] On the contrary, many empirical studies, including many conducted by the President's Commission on Obscenity and Pornography, show that sexually explicit material has a significant value for many citizens.[10] In saying that so-called obscene materials are not constitutionally protected, the Court allows the standards of the majority to be imposed upon the entire population. As such, the Supreme Court violates the basic principle of liberty. Conversely stated, it violates the principle that majority attitudes per se are not a constitutionally valid basis for suppression of individual communication. Thus the Supreme Court, in this area, denies a basic right of individuals in the social process.

Another way of addressing this point is to note that the Court's obscenity decisions are political,[11] and thus violate the ideal of neutral principles of

constitutional adjudication.[12] This society is in the midst of what some have termed a "sexual revolution," which must mean at least that there is an important debate over many questions of sexual and personal morality.[13] Some of these questions have emerged in major constitutional decisions.[14] Long-standing and deep-seated conventions of personal morality and proper sexual activity are being seriously challenged, and significant constitutional arguments are being asserted to invalidate laws regulating adult consensual sexual behavior.[15] Part of the current debate is a re-evaluation of the right of the majority to substantially ban sexually explicit communication through legal institutions.[16] Considering this current social debate over sexual morality and the Supreme Court's repeated support of the "uninhibited marketplace of ideas,"[17] it is difficult to sustain the assertion that some communication can be labeled obscene by the majority and thus withheld from the marketplace. The Court appears to be taking a political stand; i.e., one favoring one side of a debated issue at the expense of other.

Meanwhile, the assertion that obscenity is a distinct class of communication does not meet usual judicial requirements of precision. Efforts by the Supreme Court to define obscenity have repeatedly faltered,[18] as the chronology of definition and redefinition of obscenity by the Court indicates. These definitions have often failed because of their dependence upon rather dogmatic and rigid attitudes toward proper communication concerning the use of the sexual organs of the human body.[19] Different cultures, and different groups and individuals within cultures, have discrepant beliefs and attitudes in these matters.[20] The differing materials available and the controversy which surrounds the obscenity issue are testimony to the variety of viewpoints and thus the impossibility of a satisfactory delineation of obscenity through a government standard.

It is apparent, then, that obscenity laws are implicit political expressions of the broad popular attitudes toward the proper thoughts about and use of the body.[21] Other such laws have been tested by the Supreme Court and have been

stricken, including laws against the distribution of contraceptive information and devices,[22] and the suspension of a woman's right to control her own body.[23] Inasmuch as judicial application of obscenity laws directly impose a particular attitude about the proper use of the body, even according to a "community standard," it contradicts a central notion of liberty inscribed in the Constitution--to secure the greatest possible liberty of communication compatible with a like liberty for all. The First Amendment, for example, rests on the fundamental liberties of belief, conscience and expression; these are necessary conditions for the integrity and competence of a person in mastering the mind and sharing that mastery with others.[24] In short, the First Amendment enables mature communicative activity. Furthermore, the available evidence does not prove that the freedom to determine the sexual contents of one's communication is not as fundamental to this self-mastery as that freedom in other areas of communication content. On the contrary, developing methods of sexual therapy in our culture have helped people in "learning to communiate. . . in an area that heretofore in our culture has been denied the dignity of freedom of communication."[25] Obscenity laws have been used to deny such sex education and instruction,[26] contracting the spectrum of knowledge concerning the varieties of sexual pleasure and debasing the human capacity to master one's sexual life.[27] The ability of self-determination in these matters is essential to mature communication; without a suitable social context, people cannot adequately come to grips with themselves in relation to their environments and, thus, participate in the ongoing social process. Against this background, the next section outlines the justifications for obscenity suppression asserted by Chief Justice Burger, author of the majority decisions in 1973, and examines their validity.

The Assumptions and the Evidence

In the 1973 obscenity cases Justice Burger justified the suppression of sexually explicit materials through the power of the state to protect the general

quality of life and also the right of individuals to protect their own moral standards. This section examines the use of these and similar justifications of obscenity laws and finds them unsupportable in light of legal theory and in contradiction with the communicative needs of individuals and society.

In Paris the Chief Justice justified the conviction because of the "interest of the public in the quality of life and the total community environment, (and) the tone of commerce in the great city centers. . ."[28] To the extent that the justification is a valid regulation of commerce, it would at best support some type of regulation of the sale of sexually explicit materials, such as regulatory schemes limiting the geographical areas in which such material could be sold and the obtrusiveness of the advertising.[29] But the justification fails in the area of substantive law because the perscription doesn't fit the problem. In constitutional terms, such laws are struck because their means are overbroad in light of their ends, and because there is no verifiable evidence to prove that the laws solve the problem to which they are addressed.[30]

Suppose, for example, the government could prove the assertion of Anthony Comstock that the publication and use of sexually explicit material is a "social poison,"[31] leading directly to disease, death, crime and social disorder.[31] If this were verifiable, the system of liberty might be shown to be threatened by the presence of such materials. Then, consistent with similar decisions and postulate two of this chapter, the state could justifiably regulate the circulation of such material. The social poison approach was prevalent during the Victorian era,[32] but appears to rest basically on intuition and is not supported by major medical, psychological or sociological research.[33] Regardless, Justice Burger advanced the argument as justification in Paris, citing the Hill-Link minority report of the President's Commission on Obscenity and Pornography which posits "at least an arguable correlation between obscene material and crime."[34] Justice Burger ignored the fact that the minority report is based on a conviction

that obscenity ought to be suppressed to protect religious standards,[35] and ignored the main body of the Commission Report which concludes that there is no empirical evidence to support the social poison concept.[36]

Justice Burger also posited the general argument that society can forbid all access to pornographic materials in order to protect moral standards. The opinion extensively quotes Alexander Bickel's assertion that the consensual and unobtrusive use of so-called obscene materials by consenting adults intrudes upon the liberty of all members of the society. The argument of Bickel was presented as independent justification of the suppression of such materials:

> Quite apart from sex crimes, however, there remains one problem of large proportions aptly described by Professor Bickel: "It concerns the tone of society. . . (If a man) demands a right to obtain the books--discreet, if you will, but accessible to all--with others who share his tastes, then to grant him his right is to affect the world about the rest of us, and to impinge on other privacies. Even supposing that each of us can, if he wishes, effectively avert the eye and stop the ear (which, in truth, we cannot), what is commonly read and seen and heard and done intrudes upon us all, want it or not."[37] (Emphasis mine.)

This justification requires examination, for its substance appears to be that allowing any form of disapproved conduct among consenting adults violates the right of privacy of those who disapprove of that conduct. At base, the assertion is that knowledge of the existence of disapproved conduct is sufficient to justify the legal prohibition of that conduct. The Chief Justice did not require that the material have a direct effect on the commission of crime, nor a showing of specific intrusion on the rights of others. Rather, the effects of the material and the resulting power of the state to wholly suppress it was assumed arguendo.

The Burger/Bickel justification is an apparent extension of the traditional argument urged by John Stephen[38] against John Stuart Mill,[39] and the modern argument by Patrick Devlin[40] against H.L.A. Hart,[41] except that Stephen and Devlin assume that condemned conduct weakens the structure of society. The Burger/Bickel argument assumes that mere knowledge of offensive activity is an invasion of fundamental rights; the logical extension of which would be that no one in the

society would be allowed to do anything to which others have serious objection.[42] It would be a transformation of the concept of liberty from one favoring individual diversity, participatory democracy and social dynamism to one enforcing social homogeneity and rigidity. From the standpoint of communicative beings as dynamic compounds of individual and social reality, the Burger/Bickel principle would favor the forces of social objectification at the expense of individual subjective action. It would allow the legal institutions to reify majoritarian morality and prejudice.[43] Such a modus operandi on the part of the Supreme Court would counter its tradition as protector of individual rights developed in the first half of the twentieth century and more recently extended to issues such as abortion,[44] contraception for married[45] and unmarried persons,[46] miscegenation,[47] and segregated education.[48] Further, it would counter the constitutional principles of substantive due process traced below which require specific and narrow regulation according to rational means in areas affecting fundamental liberties.

The argument also contradicts the operation of a viable system of human communication. Where applied as constitutional principle, the argument would empower the majority, through the social institution of law, to create an objective social order which would suspend the communicative, participatory capacity of individuals in the society in this regard. The result would be to deny to individuals the capability of self-determination, and thus maturity, confining them to a state of adolescence. Conversely, it would deny the society the benefits of an active, participatory communication system limiting experimentation, innovation and progress. This would thereby limit capability of the social system to adapt to the environment, threatening its survival. Thus, from the point of view of the legal and political system and from that of a viable system of communication, the argument stated by Professor Bickel and elevated to legal principle in Paris by Justice Burger is unsound.

Although not explicit in the 1973 decisions, there is [illegible] of the Burger/Bickel justifications for obscenity laws which deserves attention here.[49] The argument stems from an extension of a moral perspective of the Constitution. As such it considers the libertatian protections of liberty in the Constitution as basically moral statements of principle which presuppose responsible exercise of those liberties by citizens. As a statement of principle, this morale argument is consistent with the sociological and legal perspective of this article. But the argument sometimes is taken one step further to contend that there are certain religious virtues of character traits which citizens under the Constitution must have, and that obscenity necessarily undermines these virtues, thereby undermining the constitutional order. From this extended moral position it is justifiable, perhaps necessary, to suppress obscenity.[50]

The general form of the argument is plausible and especially attractive to those with moral principles based on religious doctrine.[51] But it is circular, not supported by evidence, and raises serious independent questions under the establishment of the religion clause of the First Amendment. Its circularity stems from two co-dependent assumptions; (1) that religious and constitutional virtues are equivalent, and (2) that constitutional responsibility and obscene communication are mutually exclusive. More directly, it equates the responsibilities of constitutional citizenship with the responsibilities of a specific set of religious principles regarding the sexual function.[52] But the assumptions do not bear critical examination. It is by no means clear that one can equate the conventional virtues of democratic citizenship--responsible voting, public activity, democratic tolerance, etc.--with a religious virtue of strict avoidance from unorthodox sexual material.[53] In fact, there is no consensus in this society that such avoidance is a virtue,[54] and some religious leaders have found even religious value in otherwise banned materials.[55] And, there is increasing support among medical and psychological professionals for the use of sexually

explicit materials to aid patients integrate their physical and mental aspects, and thereby communicate more effectively with others.[56]

And if the Court accepted this circular assumption, it would again run headlong into the problem of determining what is and what is not obscene. Different behaviors and different communicational materials appeal to different tastes and produce varying responses from people of differing moralities.[57] But suppose that some sexually explicit material were definable in terms of its opposition to constitutional principles, e.g., that sadism undermines the mutual self-respect implied in the Constitution. In that case the material would be considered an expression of ideology,[58] and not suppressible under present First Amendment theory, absent evidence of incitement to imminent lawless action.[59] But the evidence is, at best, mixed, indicating that such material may even decrease anti-social behavior.[60] To the extent such material serves as a cartharsis, as a harmless outlet for aggressive fantasy, it contributes to the health of the constitutional system and ought to be protected by the courts.

In summary, there is no clear evidence of a generally accepted empirical nature that access to and use of sexually explicit materials such as those most often suppressed by obscenity laws have an adverse effect on the virtue of democratic citizenship. Nor is there significant evidence that such materials cause social and cultural breakdown. The Constitution creates a system where communication is given the presumption of protection, and the generally accepted empirical evidence does not refute that presumption in the case of sexually explicit materials.

What is left of the moral argument supporting suppression of obscene materials is based on religious conviction that obscenity undermines the social order. But special religious convictions of this type are not constitutionally admissible justification for limitation of the fundamental rights expressed in the Constitution.[61] Specifically, two major provisions of the First Amendment prohibit

such state interference; the free speech and press clause and the establishment of religion clause.[62]

This section has outlined the basic justifications now being asserted by the majority of the Supreme Court for the suppression of communication of some sexually explicit materials and has examined them in the light of their constitutional and empirical underpinnings. This analysis has found those justifications lacking in light of the legal principles generally upheld by the United States Supreme Court and in contradiction with the process of human communication.

The Tradition of Freedom

A more suitable framework for the adjudication of obscenity cases stems from the concept of liberty inscribed in the Declaration of Independence and the Constitution and since interpreted by the Supreme Court. The concept of liberty emerged from this country's social and legal heritage and has evolved over the two centuries experience and adjudication. Liberty is an operational principle of democratic government and a necessary condition for the process of communication and, as such, provides a suitable framework for the analysis of social conflicts. In cases involving sexually explicit material, this framework would avoid definitional disputes and instead encourage systematic, relational consideration. Thus, rather than centering on obscenity vel non, Supreme Court decisions would center on the system of liberty and the appropriate actions necessary to optimize the operation of that system.

Note again that the system of liberty does not provide absolute protection to the activity of citizens, but does provide a presumption of protection and requires that the government demonstrate a compelling need to forego that presumption. Libertarian democracy is based on the notion that the people control the government, not vice versa. Thus the protection of liberty includes the rights to think, to speak, to congregate, to travel and to vote according to individual determination. In other words, it guarantees the

right of self-determination, so long as that right does not infringe upon the similar right of others. In short, the principle of liberty protects all responsible participation in the social process.

In this parlance, it is the task of the United States Supreme Court to protect liberty through the cases it adjudicates, including those involving sexually explicit material. The two sections which follow outline the constitutional principles developed and applied to other areas involving fundamental rights by the United States Supreme Court and outlines their use in obscenity cases. To the extent that they can be so deliniated, the first group of principles emphasizes the communicational freedom of acting individuals, and the second group of principles emphasizes the important contextual matters which must be considered to maintain the basic system of maximum liberty for all.

Clear and Present Danger

The clear and present danger test was announced by Justice Oliver Wendall Holmes in the first major free expression cases in 1919 and has remained an important defense of liberty to the present. Although the test has undergone several stages of evolution since Holmes announced it in Schenck v. United States,[63] it has remained an important defense against state action abridging any expression which does not pose "a clear and present danger of illegal action the state has a right to prevent."[64] The test is used most often with cases which involve public advocacy of illegal activity, and the most important recent application of the test came in Brandenburg v. Ohio,[65] involving a televised report of a Ku Klux Klan rally. There the Supreme Court summarized and applied the modern version of the Holmes test:

> These . . . decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[66]

Fashioned in this manner, the clear and present danger test applies to both the content and the context of the communicative activity; the proscribable communication must be (1) directed to inciting or producing imminent lawless action, and (2) must be likely to incite or produce such action. Thus in cases where there is a threat of physical violence, the Supreme Court requires that its historical concerns with content[67] and context[68] coalesce. These requirements support the two postulates put forward above.

The Brandenburg principle underlines the Supreme Court's traditional distaste for general bans on communication.[69] The government is specifically prohibited from suppressing the advocacy of violence, the speech content, without reference to the circumstances within which the advocacy occurs. Brandenburg, in fact, specifically overruled an early free expression decision which allowed such suppression.[70] Thus, the clear and present danger test as formulated in Brandenburg prohibits a general ban on advocating violence by stipulating that such a ban can only be applied in circumstances of imminent lawless action.

The Supreme Court's distaste for bans on communication stems directly from those constitutional provisions which protect the rights of free expression and political action. Principally, it is supported by the notion that an open system of social participation is the operational principle of democracy, and that the legal institutions must be especially vigilant to protect that system. As such, the notion protects communication as the social process within which people form themselves into individuals and continually form and reform their communities and social order. The importance of communication to democratic self-government has been given considerable legal expression since the Schenck opinion, much of it following a dissent in Abrams v. United States[71] where Holmes presented the "marketplace of ideas" analogy. This famous characterization of the freedom of communication compared the search for truth to the economic marketplace and offered an impassioned argument against any unwarranted state interference in the

ideological marketplace:

> . . . when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas--that the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . .[72]

Holmes noted that many forms of speech content can endanger vital interests of society, but maintained that "we should be eternally vigilant" against attempts to suppress expressions "we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."[73] In the years since the Abrams dissent, the majority of the Court has come to accept this view[74] and has generally proceeded on the assumption that censorship is more dangerous to the public order than "the principle that debate on public issues should be uninhibited, robust, and wide-open."[75] The argument loses no force when it is applied to sexually related communication. Total bans aimed at any specific type of communication clearly diminish the marketplace of ideas by limiting access to it and participation in it. Conversely, total bans have the indirect effect of creating an ideological orthodoxy by leaving some areas open for free communication and foreclosing others. Furthermore, if the Constitution requires that the adovcacy of violence be included in the marketplace of ideas and, therefore, protected from total suppression, as the Brandenburg case mandates, then it appears a breach of judicial reasoning to hold that the Constitution requires a lesser status for obscenity.[76]

But the clear and present danger doctrine allows regulation of some communication.[77] The principle is that in certain narrowly defined circumstances where fundamental freedoms are in conflict and the state interest is compelling, the state has some power to regulate communication selectively. The test specifies both the content and the context wherein such communication can be regulated by the state. In Brandenburg the specified content is the advocacy of violence, which

would harm individuals and the public order and which is prohibited by statutes. The circumstantial context is also specified; communicational liberty can be superceded where the specified content produces the likelihood of "imminent lawless action."

Clearly, the United States Supreme Court is not neutral to all communication under all circumstances. The reason for this is illustrated in part by those who argue that some communication is "absolutely" protected. For example, Thomas Emerson defines the concept of communicational liberty along an action/expression dichotomy wherein "expression" is absolutely protected while "action" is not.[78] This dichotomy is unfortunate because it denies the role of all communication as full-fledged social action, subject to both the limitations and the protections of the Constitution. To posit, as Emerson does, that "expression" requires absolute constitutional protection implies that it is somehow disembodied from the context of communicational liberty and constitutional self-government. But communicational activity--be it specified in the First Amendment or not--requires constitutional protection precisely because it is social action and because it is important in the social order.[79]

Again, an opinion of Justice Holmes in an early free speech case involving advocacy to overthrow the government illustrates the point. Holmes' dissent in Gitlow v. United States[80] began with an affirmation of the majority assumption that First Amendment rights are due the protection of the due process clause of the Fourteenth Amendment: "The general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word 'liberty' as there used. . . ."[81] But Holmes refused to join in the conviction of Gitlow for participating in the debate on a social question by printing and distributing a revolutionary pamphlet:

> It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth.[82] (Emphasis mine.)

Emerson is right in his contention that some communication ought to be protected by the First Amendment from abridgment from state action, but that point has been categorically settled by the Court. The problem is how to regulate some communication in light of the reasons for doing so, rather than resorting to a definitional dichotomy such as obscenity/free speech or action/expression.[83] In other words, the problem is not that some communication can be regulated, but how to regulate communication of specified content without resorting to general censorship of any one type of communication. The clear and present danger test does so by limiting the context of such regulation to those circumstances which would clearly violate the system of ordered liberty. The Constitution establishes a system of liberty which by its very existence denies a constitutional right to commit lawless action. In those circumstances where the advocacy of lawless action is very likely to produce such action, the clear and present danger doctrine allows the government to protect the system of liberty. In such circumstances the countervailing interest of the integrity of the social order is considered sufficiently compelling to justify a selective governmental regulation of communication content.

When invoked and actually applied, the clear and present danger doctrine imposes a very heavy practical burden of proof on the government. First, the right of the individual to participate in the social process is presumed and the doctrine is stated in terms of the protection of that right. Second, the countervailing state interest is not granted a similar presumption of validity, but must be demonstrated by the state; the danger from the content of the expression must be proven to be both clear and present of light of the extrinsic circumstances of the case.

Applied to obscenity, the clear and present danger doctrine would provide great deference to exercise of the communicational activities of individuals, but would permit regulation in circumstances where the countervailing interests of

society are clear and compelling. In these circumstances the government would regulate obscenity as a separate form of communication content without having to regulate all other forms of communication and without having to regulate obscenity under all circumstances.

The third major section of this article develops in broad outlines some of the circumstances in which the social interest might be regarded as sufficient for purposes of regulating obscenity. Here it is important to note that careful adjudication under a clear and present danger doctrine permits government regulation in those circumstances where the danger of obscenity can be demonstrated, but would preserve the liberty of individuals in all other areas.

Prior Restraint

The prior restraint doctrine provides extensive protection of the right of self-determination of communication. Like clear and present danger, the doctrine supports the two postulates of this chapter; it is a principal support of basic communicational freedom from state interference, and it allows selective exceptions to maintain the system of liberty. The doctrine applies to published communication denying all governmental prior restraints on publication except on a showing of compelling justification.

In obscenity decisions since Miller, the prior restraint doctrine is the most important legal impediment to official censorship of sexual material. It checks the power of police and censorship boards by requiring strict adherence to the principles of procedural due process.[84]

The prior restraint doctrine has roots in the English system of licensed printers. Beginning about the time of the introduction of the printing press, the British civil and ecclesiastical governors by law retained the power of prior approval over all printers. These laws expired in 1695 and thereafter freedom from licensing and prior approval became a recognized right in the common law.[85] The most famous historical statement of the principle came in Sir William Black-

stone's eighteenth century Commentaries:

> The liberty of the press is indeed essential to the nature of a free state; but this consists of laying no previous restraints upon publications, and not the freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity.[86]

The framers of the First Amendment clearly intended to outlaw prior restraint and the basic system has never been seriously challenged.[87] In 1931 in Near v. Minnesota[88] the Supreme Court formally endorsed the broad concept and presented it as a working principle of constitutional law. The case involved a perpetual enjoinment from publication of a newspaper pursuant to a state law. The newspaper had been found guilty of publishing "malicious, scandalous and defamatory"[89] materials. The Supreme Court disallowed the enjoinment and, through Chief Justice Charles E. Hughes, stated that the prior restraint doctrine was subject to limitation "only in exceptional cases."[90] The exceptions, unfortunately, included obscenity, and otherwise paralleled those of the clear and present danger doctrine. Generally, they were direct threats to a war effort, and incitements to violence or to overthrow the government by force.

The Court in Near relied almost exclusively on the historical basis of the prior restraint doctrine and did not develop a functional rationale for either the decision or the exceptions laid out in dicta. This failure was crucial in regard to obscenity. Whereas other exceptions had already been given significant protection by that time under clear and present danger, precedent regarding obscenity was virtually absent.

The first application of the prior restraint doctrine to an obscenity case came in Kingsley Books v. Brown,[91] decided on the same day as Roth. There the justices all agreed, contrary to Near, that the prior restraint doctrine did apply to obscenity cases, but disagreed on the construction of the facts and, thus,

left the situation unresolved.[92] In 1961 the Court faced the issue in its "baldest form" in Times Film Corp. v. Chicago[93] and decided five to four that the prior restraints doctrine did not require "complete and absolute freedom to exhibit, at least once, any and every kind of motion picture."[94] Writing for the majority, Justice Tom Clark carefully limited the scope of the decision to the facts, saying, "We are dealing only with motion pictures and, even as to them, only in the context of the broadside attack presented on this record."[95] The four dissenters, led by Chief Justice Earl Warren, vigorously protested that the ordinance was a prior restraint and created a system of licensing and "censorship in its purest and most far-reaching form."[96]

In 1965 the Supreme Court decided another movie censorship case and revived the prior restraints doctrine in this area by melding it with notions of procedural due process. In Freedman v. Maryland[97] the Court struck down the state movie censorship statute for lack of adequate safeguards for protected expression. Justice William Brennan noted that "a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system."[98] The requirements stated there and since applied elsewhere include (1) placing on the censor the burden of proving that the film is unprotected expression, (2) a judicial determination in an adversary hearing to impose a final restraint, and (3) prompt final judicial decisions. In subsequent cases the Court has demanded strict conformity with the rules laid down in Freedman. In Teitel Film Corp. v. Cusack[99] it struck, per curiam, a Chicago film ordinance for lack of adequate judicial procedures, including fatal judicial delays. Similar ordinances were struck by the Supreme Court in 1968 in Interstate Circuit v. Dallas[100] and Rabeck v. New York[101] for prior restraints imposed without sufficiently specific standards. In the shadow of the Miller cases, the Court struck per curiam a conviction for obscenity in Roaden v. Kentucky[102] for lack of a proper preliminary determination of probable obscenity, and in 1975 the Court

disallowed the prior restraint of a theatre production in Southeastern Promotions v. Conrad.[103]

Two 1971 cases demonstrate the efficacy of the prior restraint doctrine in other areas of communication law. In Organization for a Better Austin v. Keefe[104] the Court disallowed an injunction sought by Keefe prohibiting the organization from "passing out pamphlets, leaflets, or literature of any kind, and from picketing anywhere in the City of Westchester, Illinois."[105] Through Chief Justice Burger, eight members of the Court affirmed the use of the Near doctrine and noted that Keefe had not met the "heavy presumption" against the constitutional validity of such restraints, despite a claim of invasion of privacy. Six weeks later the Court decided per curiam the famous and complicated "Pentagon Papers" case, New York Times v. United States,[106] wherein the prior restraint doctrine was generally upheld. Each of the justices wrote in the decision and each affirmed use of the prior restraint doctrine, but disagreed in its application to the particular facts. Most important here, the decision favored the unrestrained publication of the documents in question in spite of the United State Attorney General's claim that publication would bring about "irreparable injury" to the defense interests of the United States.

The efficacy of the prior restraint doctrine in regard to obscenity is as clear as in other areas of communication law. At bottom, the prior restraint doctrine imputes prior presumption of legitimacy and governmental protection upon communication. This presumption is implied in the system of liberty. Somewhat like the presumption of innocence of crime until proven otherwise, the prior restraint doctrine puts the burden of proof on the accuser. Prior restraint allows free communication until the exceptionable quality of the communication has been established by the censor. As in clear and present danger, the prior restraint doctrine is a principle of protection; it begins with the assumption that communication ought to be protected and requires that the censor demonstrate otherwise. As such it is an important principle of constitutional law which

ought to be applied as vigorously to obscenity as to all other areas of communication law.

The fundamental weakness of prior restraint in the obscenity areas has been the lack of a doctrinal basis for considering obscenity as an exception. The obscenity exception as announed in dictum in Near could have the effect of a substantial ban on one type of communication content, an effect which contradicts the thrust of this article. The suggestion here is that obscenity belongs with other areas of substantive law; when the countervailing interests of society are clear and compelling, selective regulation of obscenity ought to be possible.

Fundamental Freedoms and Substantive Due Process

The doctrine that the Constitution imposes restrictions on state action affecting fundamental human liberty is a basic bulwark of substantive law. The Bill of Rights specifies several of the rights construed under this constitutional guarantee of liberty, but has never been generally considered a comprehensive statement of those rights. To protect the fundamental rights, the Supreme Court has developed the rules of substantive due process which demand that whenever a state action infringes on a fundamental right the state must bear a substantial burden of justification. Similar to clear and present danger and prior restraint, the Court requires that the reason for such action be compelling and demonstratable. Further, the Supreme Court applies "close scrutiny" to determine whether fundamental freedoms have been unwarrantedly abridged.

The fundamental freedoms doctrine is most often traced to United State v. Carolene Products,[107] a 1938 case involving a federal statute concerned with economic regulation. There Chief Justice Harlan Stone stated in his opinion for the Court that in commercial regulation the courts presumed the constitutionality of laws, but added a famous footnote indicating that in matters involving fundamental

freedoms the presumption of constitutionality is reversed. In the wake of the Carolene Products footnote, the Supreme Court developed substantive due process principles protecting political and civil liberties, and has continued that protection through the present.[108]

The essence of substantive due process is that state action restricting substantive rights requires more severe and exact judicial review than that required elsewhere. The rationale is based upon judicial responsibility to protect citizen participation in the self-governing process. (These substantive due process principles are also consistent with the concept of communication here which views communication as the operational activity of democracy.) Conversely, state action which does not involve fundamental freedoms is given the presumption of constitutionality because it is the product of the political participation process; i.e., it is the expression of the will of the people. But if state action disenfranchises a segment of the electorate by restraining liberty, especially the process of communication, it potentially inhibits the ability of citizens to rationally engage in the collective decision-making process and, thus, is extended no judicial presumption of constitutionality. In such cases, constitutionality must be proven before the action is sustained by the Supreme Court; the state action must withstand "close scrutiny."[109]

To withstand this close judicial examination, the government must make the usual showing that the law has a proper societal purpose and that the constraint of liberty is reasonably related to the accomplishment of that purpose; it must also demonstraste that the societal objective is a compelling subordinating interest to the fundamental freedom, and that the state action is necessary to the accomplishment of the stated objective. In effect, this part of substantive due process is similar to clear and present danger and prior restraint. But the requirements have two additional dimensions when applied to fundamental freedoms: (1) the state action must not sweep more broadly than absolutely necessary; and

(2) the law must be sufficiently specific to give adequate warning as to what is proscribed. Specific constitutional authority for these requirements is derived from the due process clauses of the Fifth and Fourteenth Amendment, and equal protection clause of the Fourteenth Amendment, and the doctrine of unenumerated rights of the Ninth Amendment.

Several of the early fundamental rights cases were decided under these principles, including the early voting rights cases and the seminal Skinner v. Oklahoma[110] case where the Court found procreation a fundamental right. The outstanding case in the recent history of the Court is Griswold v. Connecticut,[111] the landmark case which established privacy as a fundamental constitutional right and aggressively protected the right of individuals to communication involving sexual matters. The Griswold case is especially relevant here because it involved a general ban on communication concerning birth control devices. Specifically, the litigants were prosecuted for giving information, instruction and medical advice to married persons as to the prevention of conception. The Supreme Court emphatically overturned the conviction, noting that the law was a direct and unwarranted intrusion of the intimate sexual relations of husbands and wives. The constitutional authority rested in the recognition in the majority opinion, written by Justice William O. Douglas, that the "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[112] The right of privacy was thus implicit from a number of specific provisions, including the First, Third, Fourth, Fifth and Ninth Amendments. The recognition of the protection of the First Amendment has the most direct relevance here:

> . . . the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read . . . and freedom of inquiry, freedom of thought, and freedom to teach. . .[113]

Griswold underlines the requirement that state action be narrowly tailored

so not to interfere with the fundamental rights of those who are not part of the compelling state issue. Essentially the over-breadth doctrine, as it is called, protects citizens from laws with a proper legislative purpose, but with overly broad provisions. The classic obscenity case is Butler v. Michigan,[114] where the state forbade the sale to the general public of books which were thought to have a deleterious effect on children. The legislative means clearly outstripped the problem, prompting Justice Felix Frankfurter to say, "Surely, this is to burn the house to roast the pig."[115] Thus, Frankfurter declared for the unanimous Court that the reading rights of the general public could not be suspended in light of the specific intention to protect children.

Substantive due process as applied to state action involving fundamental freedoms is strikingly similar to the more specific clear and present danger and prior restraint doctrines. Each of these begin with the assumption that important liberties are involved, and therefore the Court must place a heavy burden of proof on the government to justify the abberation. Each test requires a showing of grave state interest and specific and narrow tailoring of the state action in protection of that interest.

But substantive due process is a more general provision, which leads the Court to concentrate upon the entire system of liberty rather than on specific elements, as in clear and present danger and prior restraint. United States v. O'Brien,[116] a draft card burning case, illustrates the difference. There the Supreme Court adjudicated the case according to the principles of substantive due process and applied close scrutiny to the provision under which O'Brian was prosecuted. The law was found to serve a compelling state interest without unwarranted intrusion upon fundamental rights. The conviction was thus upheld. Had the Court concentrated on the First Amendment challenge and applied the clear and present danger doctrine as O'Brien suggested, it is unlikely that the government could have made the required showing of either imminent lawless action or

clear danger to the security of the country. Likewise, the law might well have been held invalid had it been construed as a prior restraint on the publication of the views of O'Brien.

Application of the requirements of substantive due process to the question of obscene material is profoundly consistent with the needs of the system of human communication, and provides a body of judicial precedent successfully applied in other areas of human liberty. The rationale for inclusion of the right to control communication concerning sexual materials exists in several of the cases, including those above. Clearly, even if the Court continues to persist in the notion that such material is not protected by the specific provisions of the First Amendment, expanded protection could be granted under substantive due process principles. This protection would be consistent with the concept of liberty expressed in the Constitution and developed by the emerging precedent of the Supreme Court. Extended use of substantive due process in obscenity cases would be supported by the Court's careful application of the prior restraint doctrine in these cases and decisions like Griswold which grant constitutional protection of the rights to distribute, receive and read sexual materials, and the freedoms of inquiry, thought and teaching such matters.

It is important to emphasize before moving to the next section that the principles of clear and present danger, prior restraint and substantive due process do not bestow "absolute" liberty upon individuals to pursue their self-determined activity regardless of the social context. Instead, these principles elevate the system of liberty to a primary constitutional position and allow the weighing of all factors relevant to the preservation of that system. As such, they are consistent with the notion that communication is inextricably associated with the social process, and that individual freedom is continually bounded by social reality. The principles therefore support the process of human communication and allow the incorporation of legal consideration of all the relevant factors. Some

factors of compelling importance to the maintenance of the system of liberty are sketched in the next section.

Compelling Competing Interests:
Two Primary Areas Requiring Consideration

This section contends that the system of liberty, based on human communication protected by constitutional government requires that primary group associations (especially the family) and privacy be carefully considered in the adjudication of obscenity cases. A recurrent theme in the Court's obscenity decisions has been the protection of the family and of other self-determined communicational environments. Sufficient precedent and functional rationale exists to treat these as compelling social interests which can sometimes be countervailing, and thus be recognized by the Supreme Court as legitimate benchmarks in the regulation of sexually explicit materials.

Note at the onset that human communication implies the capacity of men to make value judgments from human experience, i.e., to operate rationally. Likewise, liberty presupposes rationality and socially responsible exercise of that capacity; the liberty of communication correlates with the liberty of others to choose to participate or not in specific aspects of the social process. Thus, the principles of liberty do not apply to persons presumably lacking rationality or those who have not reached maturity, such as children or the insane. Furthermore, the society protects enclaves of communicational stability and support where humans can develop and sustain their system of rationality, where they can selectively choose what will and will not enter their communicational environment.[117] The communicational needs of humans and the libertarian spirit of the Constitution support selective regulation of communication consistent with these concerns.

Protection of Primary Group Communication

The Supreme Court has given considerable support to the leaders of primary groups, namely parents in families, in order that children can organize themselves in the enclaves of communicational support necessary for maturation. The decision

of Justice William Brennan in Ginsberg v. New York[118] contains one of the most direct statements of such support:

> First of all, constitutional interpretation has consistently recognized that parents' claims to authority in their own households to direct the rearing of their children is basic in the structure of our society. . . . (P)arents and others, teachers for example, who have this primary responsibility for children's well being are entitled to the support of law designed to aid discharge of that responsibility.[119]

Accordingly, Brennan reasserted the position that "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults,"[120] and used that power to sustain a New York law regulating the sale of sexually explicit material to children.

This position of the Supreme Court supports primary group association, a necessary element for mature communication. The importance of primary group association stems from its function as a generative base for the communicative process in children. Children create their first ordered and unified conceptions of the world in primary group association and eventually learn to integrate the larger world outside into a mature conceptual scheme. As such, it is the source of mature communicative action and of compelling importance to the system of democratic living.

These considerations permeate American law; children never automatically have full rights of adults, and most often attain their rights vis-a-vis their parents. Correlatively, the protective power of the government over youth is greater than the protective power of government over adults.[121] The assumption is apparent in several areas, including state restrictions on child labor, commercial activity, marriage and military service.

In the obscenity area the pattern is quite distinct. Chief Justice Burger prefaced his announcement of the "serious value" test in Miller by saying that it was presented against the background of obtrusive exposure to unwilling audiences and to juveniles,[122] although he spurned these as the only justifications of obscenity suppression in Paris and the other obscenity cases decided

that day. In Ginsberg the Court held that a state statute prohibiting the dissemination of obscenity to minors was valid when sufficiently specific and selective. Redrup v. New York[123] stated that a "specific and limited state concern for juveniles" was a permissible factor in obscenity regulation. The primary dissents in the 1973 decisions were filed by Justice Brennan, author of Ginsberg. Though Brennan expressly refused to consider the issue of children, he noted no dissatisfaction with his Ginsberg opinion and intimated continued recognition of the state power in the area.[124] Thus, all members of the Court at the time of Miller, except Justice Douglas, appear to agree that the government has the constitutional authority to support parents in the selective regulation of their children's exposure to obscenity. The regulatory rationale is consistent with a comprehensive understanding of human communication and is perhaps most succinctly stated by Justice Potter Stewart in his Ginsberg concurrence:

> I think a State may permissibly determine that, at least in some precisely delineated areas, a child--like someone in a captive audience--is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees.[125]

The Supreme Court decision in Tinker v. Des Moines Independent Community School District[126] helps illustrate some of the important issues. In Tinker the Court upheld the right of school children to wear black armbands as part of a peaceful political protest; the justices supported the right of the children to use the school as a secondary socialization institution for education in political participation. In Ginsberg and similar cases the justices have taken the converse of the Tinker position, protecting children from unregulated communicational environments. The opinion of Justice Abe Fortes clarifies the distinction by noting that schools "may not be enclaves of totalitarianism," nor should "students be regarded as closed-circuit recipients"[127] of communication in such environments.

The decision thus supports the position that arbitrarily restricting the

right of children to participate in the ideological marketplace of ideas would have a stultifying effect on individual growth, and would disregard the function of schools as preparatory institutions for democratic decision makers. The process of education and communication implies regulated exposure to ideas of ever increasing complexity and diversity. The schools, as the churches and other secondary socialization institutions, are the logical extensions of the family. Thus, the notion that the state has a compelling interest in the protection of youth has a double edge which recognizes the right of youth to preliminary participation in the social process, but under the guided supervision of those responsible for their communicational environment. It proceeds from the fundamental fact of human communication that the capacity of imparting value on experience requires the attainment of maturity in a relatively stable communicational environment. That level of rational decision making is attained at an age level somewhere in the range of upper adolescense and, although exceptions to that norm exist in both directions, the norm reflects the social reality, and society has a compelling interest in translating that reality into legislation.[128]

As a constitutional principle, the use of youth as a select class does not reach the infirmity under the Equal Protection Clause of the Fourteenth Amendment often associated with other such classifications.[129] Youth as a state in life is neutral as to race, national heritage, religion and sex; it is a state through which all must pass and is not permanent. Furthermore, the restriction of youth would allow only a partial ban, leaving the consenting adult's rights to access to obscenity virtually unimpeded.

Such regulation adds a positive dimension to the system of liberty; it operates to strengthen the capability of parents to choose for their children the type of material which will enter their primary communicational environments. Such regulation is functionally similar to regulations which allow adults to

control their own communication under the law of privacy discussed below.

Privacy

The notion of privacy explored in an earlier section of this article also has a correlative dimension which gives it strong bearing as a compelling interest which requires careful consideration by the Supreme Court in obscenity cases.[130] Privacy in light of Griswold above is essentially a fundamental right of persons to access to materials of a private nature without the interference of the state. The notion of privacy directly supports the first postulate of this chapter that the concepts of fundamental liberty implicit and explicit in the Constitution prohibit state actions which create substantial bans on communication content. The correlative aspect of the privacy issue is that there is a very important sphere of human communication which must necessarily remain private, i.e., beyond the purview and control of the larger society. This allows individuals to maintain essential control over their own communicative behavior in order that they can preserve and continually develop their own identities. In essence privacy is the functional corollary of the primary groups of children and requires strict protection from the legal institutions.

Accordingly, freedom from privacy invasion has been reasserted in several recent decisions of the Supreme Court which have elevated privacy to clear constitutional status. For example, the right has been used to protect woman's right to make the abortion decision in consultation with her personal physician,[131] an association's right to maintain the secrecy of its membership list,[132] and a person's right not to have private information published in a newspaper feature article.[133] The issues of privacy and obscenity met in Stanley v. Georgia,[134] which upheld the right of Stanley to view obscene materials in his home, and Rowan v. Post Office,[135] which upheld a home owner's right to block sexually offensive mail from entering his home. These cases grant extensive protection to individuals in their pursuit of a zone of privacy and indicate the permissible

posture of the state vis-a-vis the individual control of that zone.

The justification of the right of privacy pervades the spirit of the Constitution.[136] In fact, one of the functional bases of the constitutional system of government by, for and of the people is the presumption of the ability of citizens to choose in the ideological marketplace. Not only should the government be prohibited from invading this zone, as in Stanley, but the government should help individuals protect this zone from the intrusion of unwanted ideas, as in Rowan. In the terminology of the second postulate of this article, the state has a compelling interest in the ability of individuals to maintain enclaves within which the communication process can prosper. Implicit in the "marketplace of ideas" analogy is the notion that once persons have made their selection, they can retreat to savor and use it; perhaps even improve it and reintroduce it into the market. But without a human mind developed and maintained in the privacy of one's personal enclave, the marketplace would have few buyers. Thus, if an individual desires to block certain materials from his communicational environment, it appears proper for the government to aid him in that quest. While vigorous competition in the marketplace may be essential for the survival of communicational liberty, the competition need not be ubiquitous. Or as Justice Louis Brandeis noted in his famous concurrence in Whitney v. California:[137] "Those who won our independence believed that the final end of the state was to make men free to develop their facilities. . . . They valued liberty both as an end and as a means."[138]

This right of the state to assist people in this regard is outlined by the Supreme Court's traditional respect for those who are in a so-called "captive audience." In Saia v. New York[139] in 1948 and Kovacs v. Cooper[140] in 1949, the Court allowed the regulation of sound trucks so long as that regulation was not based on the content of the ideas and the regulation was not vague and overbroad. Other cases, such as Public Utilities Commission v. Pollak,[141] have noted that

persons do not have unlimited rights to an enclave of privacy, especially when a person leaves his home. In Pollak the Court refused to sustain an injunction against the broadcasting of news and advertising in a public bus system, maintaining that an individual's zone of privacy is not unlimited and must be weighed against the concommittment rights of others.

One potentially troublesome element in the protection of privacy is the proper role of the government in the quest for individual privacy. Perhaps the best example of successful resolution of this is the statute upheld in Rowan which allowed a person to "require that a mailer remove his name from its mailing lists and stop all future mailings. . . .[142] Writing the majority opinion Chief Justice Burger noted that the Court has traditionally respected the right of householders to bar people from their home, and that it is appropriate to "make the householder the final judge of what will cross his threshhold" in spite of the fact that such power impeded the flow of ideas.[143] The Chief Justice noted the law specifically escaped a constitutional challenge in this regard because the individual was making the determination, not the government.

> Both the absoluteness of the citizen's right under (the law) and its finality are essential; what may not be provocative to one person may well be to another. . . Congress provided this sweeping power not only to protect privacy but to avoid possible constitutional questions that might arise from vesting the power to make any discretionary evaluation of the material in a government official.[144]

The notions expressed by the Chief Justice in the Rowan case provide firm positive precedent in the area of sexually explicit material. Vesting the power of control of communication in mature individuals, both as individuals and as leaders of primary groups, keeps significant power of self-determination of communication in the hands of citizens. Meanwhile those who do not wish particular material are assisted by the state in exercising their power against it. The government acts only to assist people in their exercise of constitutional rights and does not limit the right of access to such materials.

Summary

Thus, deriving its power from the direction of individuals, the state can be allowed the power to regulate communication selectively. In the areas of youth and privacy, the government may conclude that the state has a compelling interest in protecting the system of liberty and thus in certain narrowly defined situations may assist the exerci se of that liberty by individuals by carefully restricting the sale and use of obscenity.

One important aspect to consider here is the narrowness of permissible regulation. As in Butler above, regulation designed to protect the compelling state interest in primary group association and individual enclaves of privacy must be clearly, on its face,[145] as construed by the courts or applied by the law enforcement agencies, related only to those interests and not sweep unnecessarily into the compelling interests of liberty of adults. The state's power cannot be used as a covert tool for placing a substantial ban on the dissemination of obscenity to consenting adults, nor can it have that practical effect. A functional test for detecting such an abuse of state power might be: does the regulatory scheme in question restrict the spectrum of materials available to consenting adults?[146] If the scheme does not do so and is otherwise constitutional, it could be upheld as a valid exercise of governmental power.

NOTES AND REFERENCES

[1]413 U.S. 15 (1973).

[2]413 U.S. 49 (1973).

[3]354 U.S. 476 (1957).

[4]413 U.S. 15, 24 (1973). (Quoting Roth, 354 U.S. 476, 489.)

[5]413 U.S. 15, 25 (1973).

[6]394 U.S. 557 (1969).

[7]413 U.S. 15, 24.5 (1973).

[8]But see: Jacobellis v. Ohio, 378 U.S. 184, 192-3 (1964).

[9]The most comprehensive collection of data concerning the effects of sexually explicit material is contained in: United States Commission on Obscenity and Pornography, Report of the Commission on Obscenity and Pornography (Washington: Government Printing Office, 1970), pp. 154-163. Works predating the Report of the Commission include: Robert Cairns, James Paul and Julius Wishner, "Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence," Minnesota Law Review 46 (1962), p. 1009; Marie Jahoda, The Impact of Literature: A Psychological Discussion of Some Assumptions in the Censorship Debates (New York: Research Center for Human Relations, New York University, 1954); and George Murphy, "The Value of Pornography," Wayne Law Review, 10 (1964), p. 165. Material updating the Report of the Commission in this regard include: Helen Money and Peter Anthanasion, "Pornography: Review and Bibliographic Annotations," American Journal of Obstetrics and Gynecology 115 (1973), pp. 143-146; John Gagnon and William Simon, Sexual Conduct (Chicago: Aldine, 1973), pp. 265-275; and W. Cody Wilson, "Facts Versus Fears: Why Should We Worry about Pornography?" Annals of the American Academy of Political and Social Sciences 397 (1971), pp. 105-117.

[10]See: Michael Goldstein and Harold Kant, Pornography and Sexual Deviance (Berkeley, California: University of California Press, 1973), pp. 147-153; Report of the Commission, pp. 128-134; and Ned Polsky, Hustlers, Beats and Others (Chicago: Aldine, 1967), pp. 186-202.

[11]See: Lawrence W. Rosenfield, "Politics and Pornography," Quarterly Journal of Speech 59 (1973), p. 413. For a contrasting view see: George Anastaplo, "Obscenity and Common Sense," St. Louis University Law Journal 16 (1972), p. 527.

[12]See: Wechsler, "Toward Neutral Principles of Constitutional Law," Harvard Law Review 73 (1959), p. 1; Alexander Bickel, The Least Dangerous Branch (New York: Bobbs-Merrill, 1962); Hugo Black, "The Lawfulness of the Segregation Decisions," Yale Law Journal 69 (1960), p. 421; Louis Henkin, "Some Reflections on the Current Constitutional Law Controversy," University of Pennsylvania Law Review 109 (1961), p. 637; Charles Wright, "Professor Bickel, the Scholarly Tradition and the Supreme Court," Harvard Law Review 84 (1971), p. 769.

[13]See for examples of discussions of the topic: John Petras, Sexuality in Society (Boston: Allyn and Bacon, 1973); Shulamith Firestone, The Dialectic of Sex (New York: Murrow, 1970); and Eugene Kennedy, The New Sexuality: Myths, Fables and Hang-ups (New York, Doubleday, 1971).

[14]See, for example: Row v. Wade, 410 U.S. 113 (1973) (abortion); Griswold v. Connecticut, 381 U.S. 479 (1965) (contraception).

[15]See, for example: Walter Barnett, Sexual Freedom and the Constitution (Albuquerque, New Mexico: University of New Mexico Press, 1973). (Challenging the constitutionality of laws against consensual homosexual acts)

[16]Note, for example, the formation and use of the President's Commission on Obscenity and Pornography. See also: D. F. Barber, Pornography and Society (London: Skelton, 1972); Ray C. Rist, The Pornography Controversy: Changing Moral Standards in American Life (New Brunswick, New Jersey: Transaction Books, 1975); Eli Oboler, Fear of the Word: Censorship and Sex (Metuchen, New Jersey: Scarecrow, 1974).

[17]Reaffirmed repeatedly since introduced as legal theory by Justice Oliver Wendell Holmes in Abrams v. United States, 205 U.S. 616 (1919). For an example of recent use

by the Court see: Miami Herald Publishing Company v. Tornillo, 418 U.S. 214 (1974).

[18]See, note: "Obscenity: The Definitional Dilemmia," Georgia State Bar Journal 10 (1973), p. 327.

[19]See: Louis Henkin, "Morals and the Constitution: The Sin of Obscenity," Columbia Law Review 63 (1963), p. 390; Harry Clor, Obscenity and Public Morality (Chicago: University of Chicago Press, 1969); David A. J. Richards, "Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment," University of Pennsylvania Law Review 123 (1974), p. 45.

[20]See: Leon Gichner, Erotic Aspects of Chinese Culture (New York: Simon and Schuster, 1957); Phillip Rawson, Erotic Art of the East (New York: Putnam, 1968); Phyllis Kronhausen and Eberhard Kronhausen, Pornography and the Law (New York: Ballantine, 1959).

[21]See: Richards, "Free Speech," p. 72.

[22]Griswold v. Connecticut, 381 U.S. 479 (1965).

[23]Roe v. Wade, 410 U.S. 113 (1973).

[24]For a summary of the premises upon which the First Amendment is based see: Thomas I. Emerson, The System of Freedom of Expression (New York: Random House, 1970), pp. 6-9.

[25]William Masters and Virginia Johnson, Human Sexual Inadequacy (Boston: Little, Brown and Company, 1970), p. 204.

[26]The text of the substantive section of the Comstock Act § 2, ch. 258, § 2,17 Stat. 598, 599 (1873), as amended, 18 U.S.C.A. 1461 (1970) reads as follows: [N]o obscene, lewd, or lascivious book, pamphlet, picture, paper, print, or other publication of an indecent character, or any particle or thing designed or intended for the prevention of conception or procuring of abortion, nor any article or thing intended or adapted for any indecent or immoral use or nature, nor any written or printed card, circular, book, pamphlet, advertisement or notice of any kind giving information, directly or indirectly, where, or how, or of whom, or by what means either of the things before mentioned may be obtained or made, nor any letter upon the envelope of which, or postal-card upon which indecent or scurrilous epithets may be written or printed, shall be carried in

the mail. . . ." See also Chapter III tracing the historical development of obscenity law, especially: United States v. Dennett, 39 F. 2d 564 (2d Cir. 1930).

[27]The President's Commission on Obscenity and Pornography supported its proposal for the liberalization of obscenity laws in light of the need for better sex education. See: Report of the Commission, pp. 47-48, 58, 265-279. Note also that popular sex manuals have recommended the use of the type of materials prosecuted under obscenity laws including: Alex Comfort, ed., The Joy of Sex (New York: Crown, 1972), pp. 208-209. Note also the similar suggestion in: Bertrand Russell, Marriage and Morals (New York: Liveright, 1929), pp. 93-117.

[28]413 U.S. 49, 58 (1973).

[29]Such a suggestion has been made by: Richard Kuh, Foolish Figleaves (New York: Macmillan, 1967), pp. 269-279.

[30]A discussion of the law of substantive due process in this regard appears below in this chapter.

[31]The metaphor of poison pervades the writing of Anthony Comstock. For example, he noted the case of the thirteen-year-old girl, in whose bureau he "found a quantity of the most debasing and foul-worded matter. The last heard from this child she was in a dying condition, the result of habits induced by this foul reading." Anthony Comstock, Traps for the Young, ed. Robert Bremmer (Cambridge, Massachusetts: Belknap, 1967), p. 139.

[32]See: Alex Comfort, The Anxiety Makers (New York: Dell, 1970); John Haller and Robert Haller, The Physician and Sexuality in Victorian America (Urbana: University of Illinois Press, 1974); and John Hare, "Masturbational Insanity: The History of an Idea," The Journal of Mental Science 108 (1962), pp. 6-9.

[33]See notes 9 and 10 above.

[34]413 U.S. 49, 58 (1973).

[35]See: Report of the Commission, pp. 383, 385-386.

[36]Ibid., pp. 215-143. In fact, the experience in Denmark was after the repeal of its obscenity statutes, as applied to the consensual behavior of adults, the rate of sex crimes actually lowered. See: Ibid., pp. 230-232;

United States Commission on Obscenity and Pornography, Technical Report, Vol. VII (Washington: Government Printing Office, 1971), p. 254.

[37]413 U.S. 49, 59 (1973).

[38]John Stephen, Liberty, Equality, Fraternity (New York: Cambridge University Press, 1968).

[39]John Stuart Mill, On Liberty, ed. Currin Schields (New York: Bobbs-Merrill, 1956).

[40]Patrick Devlin, The Enforcement of Morals (London: Oxford, 1965).

[41]H. L. A. Hart, Law, Liberty, and Morality (Stanford, California: Stanford University Press, 1963). See also: Christian Bay, The Structure of Freedom (Stanford, California: Stanford University Press, 1958).

[42]Hart, pp. 46-47.

[43]See: Walter Barnett, "Corruption of Morals," Journal of Law and Social Order 2 (1971), pp. 189-243; and Ronald Dworkin, "Lord Devlin and the Enforcement of Morals," Yale Law Journal 75 (1966), p. 986.

[44]Row v. Wade, 410 U.S. 113 (1973).

[45]Griswold v. Connecticut, 381 U.S. 479 (1965).

[46]Eisenstadt v. Baird, 405 U.S. 438 (1972).

[47]Loving v. Virginia, 388 U.S. (1967).

[48]Brown v. Board of Education, 347 U.S. 483 (1954).

[49]Following the Bickel quote in Paris, the Chief Justice implied the argument by saying: "As Chief Justice Warren stated there is a 'right of the Nation and of the States to maintain a decent society. . . .'" 413 U.S. 49, 59-60 (1973). Quoting the late Chief Justice Warren from Jacobellis v. Ohio, 378 U.S. 184, 199 (1964).

[50]For statements of this view see: Harry Clor, Obscenity and Public Morality: Censorship in a Liberal Society (Chicago: University of Chicago Press, 1969); and Walter Berns, "Pornography vs. Democracy: The Case for Censorship," The Public Interest 22 (1971), p. 1. For a contrary view see: Richards, "Free Speech."

[51]For example, the Cannon Law of the Roman Catholic Church states that ". . . as a basic and cardinal fact, that complete sexual activity and pleasure is licit and moral only in a naturally completed act in a valid marriage. All acts which, of their psychological and physical nature, are designed to be preparatory to the complete act, take their licitness and their morality from the complete act. If, therefore, they are entirely divorced from the complete act, they are distorted, warped, meaningless, and hence immoral." Quoted from Harold Gardiner, "Moral Principles Toward a Definition of the Obscene," Law and Contemporary Problems 20 (1965), p. 564. Charles Keating, a member of the President's Commission, claims that obscenity is against the law of God and is thus justifiably suppressed. See: Report of the Commission, pp. 511, 515, 547.

[52]This view derives from the classic teaching of St. Augustine that the only proper sexual thoughts and acts are those directly aimed at reproduction. See: Saint Augustine, The City of God, trans. W. J. Wand (New York: Oxford Press, 1963). For a contrary view see: Masters and Johnson, Sexual Inadequacy, pp. 189-199.

[53]See: Richard McKeon, Robert Merton and Walter Gelhorn, The Freedom to Read (New York: Bowker, 1957), pp. 23-24.

[54]See: Petras, Sexuality; Allan Sherman, A History of the Sex Revolution (Chicago: Playboy Press, 1973); Jay Daily, The Anatomy of Censorship (New York: Dekker, 1973).

[55]See: Memoirs v. Massachusetts, 383 U.S. 413, 433 (1966). (Appendix to the opinion of Justice Douglas, consisting of an address by a clergyman urging that Fanny Hill was a moral book.) See also: Report of the Commission, p. 378.

[56]A significant number of couples in a survey reported by William Lockhart noted that exposure to sexually explicit materials produced increased openness and satisfaction in their marriages. See: William B. Lockhart, "The Findings and Recommendations of the Commission on Obscenity and Pornography: A Case Study of the Role of Social Science in Formulating Public Policy," Oklahoma Law Review 24 (1971), p. 218. See also note 25 above.

[57]Note, for examples, the differing views on the same material by the Justices of the Supreme Court in the many cases chronicled in Chapter IV.

[58] Kingsley Pictures most directly illustrates the Supreme Court position on ideological obscenity. There the majority construed the conviction as resting on the proposition that the film "alluringly portrays adultery as proper behavior," and responded that it had thus "struck at the very heart of constitutionally protected liberty." Kingsley International Pictures v. Regents, 360 U.S. 684, 688 (1959).

[59] [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). See also the general discussion of the clear and present danger doctrine as applied to obscenity below.

[60] Gorer notes that de Sade himself experienced such a release and during some times of his life displayed considerable tolerance and sympathy. See: Geoffrey Gorer, The Danger of Equality (New York: Weybright and Tally, 1966), p. 210.

[61] The outstanding obscenity case of this type is Burstyn, where a city wished to ban a movie because of alleged "sacrilegious" content. The response of the Supreme Court was direct and terse: "[T]he state has no legitimate interest in protecting any or all religions from views distasteful to them. . ." It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speech or motion pictures." Burstyn v. Wilson, 343 U.S. 495, 502 (1952).

[62] Epperson v. Arkansas, 393 U.S. 97 (1968); Barnett, pp. 74-93; and Henkin, p. 391.

[63] 249 U.S. 47 (1919).

[64] Ibid., at 52.

[65] 395 U.S. 444 (1969). The clear and present danger test enjoyed a period of general acceptance in the wake of Schenck but was significantly weakened in the 1950s in American Communication Association v. Douds, 339 U.S. 382 (1950), and Dennis v. United States, 341 U.S. 494 (1951). It was later strengthened in Yates v. United States, 354 U.S. 298 (1957). In the 1960s the test was not generally used, prompting Harry Kalven to announce its demise, but

was resurrected by the Supreme Court in Brandenburg. See: Harry Kalven, "The New York Times Case: A Note on 'The Central Meaning of the First Amendment,'" Supreme Court Review 1964 (1964), pp. 213-214. Other important discussions of the clear and present danger tests are reported in: High Strong, "Fifty Years of Clear and Present Danger," Supreme Court Review 1969(1969), p. 41; Martin Shapiro, Freedom of Speech: The Supreme Court and Judicial Review (Englewood Cliffs, New Jersey: Prentice-Hall, 1966), pp. 121-135.

[66]395 U.S. 444, 447 (1969).

[67]See: Whitney v. California, 274 U.S. 357 (1927); and Gitlow v. New York, 268 U.S. 652 (1925).

[68]See: Abrams v. United States, 250 U.S. 616 (1919); Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); and Schenck v. United States, 249 U.S. 47 (1919).

[69]A classic such statement comes in Lovell v. Griffin, 303 U.S. 444 (1938): "The ordinance prohibits the distribution of literature of any kind at any time, at any place, and in any manner without a permit from the City Manager. We think the ordinance is invalid on its face. Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship." Ibid., at 449.

[70]395 U.S. 444, 449 (1969). The case was Whitney v. California, 274 U.S. 357 (1927).

[71]250 U.S. 616 (1919).

[72]Ibid., at 630.

[73]Ibid.

[74]See, for examples: C.B.S. v. Democratic National Committee, 412 U.S. 94 (1973); and Miami Herald Publishing Company v. Tornillo, 418 U.S. 241 (1974).

[75]New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

[76]Note that the suppression of obscenity is based largely on the dicta from cases pre-dating Roth v. United States, 354 U.S. 476 (1957). Significantly, the Court has retreated from much of the dicta concerning other exemptions

to fundamental liberties stated with obscenity in these cases. Note also that the Court's reliance in Roth on the quoted portion of Chaplinsky v. New Hampshire, 3 4 U.S. 568, 571-572 (1948), which in turn relies on Zechariah Chafee is misplaced. Chafee viewed obscenity as justifying application of the clear and present danger test, or some variation thereof, but not as putting obscenity outside the First Amendment altogether. See: Zechariah Chafee, Government and Mass Communications (Chicago: University of Chicago Press, 1947), pp. 49-61.

[77]One of the persistent criticisms of clear and present danger has been that it does not, of itself, offer a rationale for regulation. See, for example: Benjamin DuVal Jr., "Free Communication of Ideas and the Quest for Truth: Toward a Teleological Approach to First Amendment Adjudication," The George Washington Law Review 41 (1972), pp. 166-178. This section views the test in the context of its use by the Supreme Court, but does not present it as the exclusive test for obscenity adjudication.

[78]See especially: Emerson, System, pp. 14-20. The absolutist position of Justice Hugh Black follows a similar pattern. Compare the Black opinions in obscenity cases to those involving demonstrations and protests. For examples, see: Adderley v. Florida, 385 U.S. 39 (1966); and Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969).

[79]"Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty." Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, concurring).

[80]268 U.S. 652 (1925).

[81]Ibid., at 672.

[82]Ibid., at 673.

[83]Emerson objects to the defining element of the Supreme Court's adjudication of obscenity cases, but similarly applies his own dichotomy. "There remains, then, the task of analyzing the obscenity problem in terms of the expression-action theory of the First Amendment here being proposed. Clearly most communication alleged to be obscene constitutes

'expression.' It appears in oral, written or pictorial form, as speech, a book, picture, film, play, or the like. There are, however, some areas in which the conduct alleged to be obscene, or to contain obscenity, would be classified as 'action.' Thus most of what may be called 'live conduct' falls into the category of action. . . . Admittedly these are difficult lines to draw at times. The result reached may on the surface sometimes appear arbitrary or nonsensical," Emerson, System, p. 495.

[84]See, for example: Roaden v. Kentucky, 413 U.S. 496 (1973), reversing an obscenity conviction for the lack of adequate judicial determination of probable obscenity before official restraint of further sale of sexually explicit material. For discussion of the prior restraint doctrine as a protection of alleged obscenity pre-dating the Miller decisions see: Emerson, System, pp. 503-512.

[85]A more comprehensive study of the English history of press restraint is contained in: Fredrick Siebert, Freedom of the Press in England, 1476-1776, Illini (Urbana, Illinois: University of Illinois Press, 1952).

[86]Quoted from Gerald Gunther and Noel Dowling, Constitutional Law: Cases and Materials (Mineola, New York: Foundation Press, 1970), p. 1260.

[87]Note the opinion of Justice Black in: New York Times v. United States, 403 U.S. 713 (1971).

[88]283 U.S. 697 (1931).

[89]Ibid., at 702.

[90]Ibid., at 715.

[91]354 U.S. 436 (1957).

[92]The case dealt with a complex regulation which was construed by some justices more like a prior restraint, and by others as more like straight subsequent punishment for commission of a crime.

[93]365 U.S. 43 (1961).

[94]Ibid., at 46.

[95]Ibid., at 50.

[96]Ibid., at 49.

[97]380 U.S. 51 (1965).

[98]Ibid., at 60.

[99]390 U.S. 139 (1968).

[100]390 U.S. 676 (1968).

[101]391 U.S. 462 (1968).

[102]413 U.S. 496 (1973). See also note 84 above.

[103] U.S. (1975), 43 LW 4365 (1975).

[104]402 U.S. 415 (1971).

[105]Ibid., at 417.

[106]403 U.S. 713 (1971).

[107]304 U.S. 144 (1938).

[108]A comprehensive statement of that protection as regards to sexual freedom is contained in: Barnett, Sexual Freedom.

[109]Substantive due process is also used as a principle under the "equal protection" clause of the Fourteenth Amendment. As such it is used to ensure that suspect classifications, e.g., those regarding race, religion, national origin, are protected from unequal treatment under the law. See for example: Shapiro v. Thompson, 394 U.S. 618 (1969).

[110]316 U.S. 535 (1942).

[111]381 U.S. 479 (1965).

[112]Ibid., at 484.

[113]Ibid., at 482.

[114]352 U.S. 380 (1957).

[115]Ibid., at 383.

[116]391 U.S. 367 (1968).

[117]An extensive discussion of this is contained in: Derek Willard, "Privacy as Communication: A Conceptual Approach for Law and Social Science" (Ph.D. dissertation, University of Iowa, 1975).

[118]390 U.S. 629 (1968).

[119]Ibid., at 639.

[120]Ibid., at 638. (Citing Prince v. Massachusetts, 231 U.S. 158, 170 (1944)).

[121]Prince v. Massachusetts, 321 U.S. 158 (1944), illustrates the greater power of the government over children than over adults as regards to constitutional rights. In Prince the Court upheld a Massachusetts law prohibiting any girl under eighteen from selling periodicals in "any street or public place." (Ibid., at 161.) The law was upheld against a claim of the right, under the free exercise of religion clause of the First Amendment, to sell religious literature. Had the law had the effect of a general ban of the sale of periodicals, as in Lovell, the Court would have most likely struck it. Because the Prince law was limited to children, the Court favored the state interest in protecting the safety and health of children over the First Amendment challenge.

[122]413 U.S. 13, 24 (1973).

[123]386 U.S. 767 (1967).

[124]Brennan said: "The opinions in Redrup and Stanley v. Georgia reflected our emerging view that the state interests in protecting children and in protecting unconsenting adults may stand on a different footing from the other asserted state interests." (413 U.S. 49, 106 (1973)).

[125]390 U.S. 629, 649-650 (1968).

[126]393 U.S. 503 (1969).

[127]Ibid., at 511.

[128]Generally the President's Commission on Obscenity and Pornography "recommends the adoption by the States of legislation . . . prohibiting the commercial distribution or display for sale of certain sexual materials to young persons." Report of the Commission, p. 70. The Commission made the recommendation with these comments: "In view of

the limited amount of information concerning the effects of sexually explicit materials on children, other considerations have assumed primary importance in the Commission's deliberations. The Commission has been influenced, to a considerable degree, by its finding that a large majority of Americans believe that children should not be exposed to certain sexual materials. In addition, the Commission takes the view that parents should be free to make their own conclusions regarding the suitability of explicit sexual materials for their children, and that it is appropriate for legislation to aid parents in controlling the access of their children to such materials during their formative years." (Ibid., at p. 63.) (Emphasis mine.)

[129]See note 109 above.

[130]See the discussion by Willard which considers privacy as a constituent aspect of the process of communication, a point of view not inconsistent with this dissertation. See: Willard, pp. 277-322.

[131]Row v. Wade, 410 U.S. 113 (1973).

[132]NAACP v. Alabama, 357 U.S. 449 (1958).

[133]Cantrell v. Forest City Publishing, 419 U.S. 245 (1974).

[134]294 U.S. 557 (1969).

[135]397 U.S. 728 (1970).

[136]For a comprehensive account of the development of privacy law in the United States see: Willard, pp. 115-182.

[137]274 U.S. 357 (1927).

[138]Ibid., at 375-376.

[139]334 U.S. 558 (1948).

[140]336 U.S. 77 (1949).

[141]343 U.S. 414 (1952).

[142]397 U.S. 728, 729 (1970).

[143] Ibid., at 736.

[144] Ibid., at 737.

[145] See: Broadbeck v. Oklahoma, 413 U.S. 601 (1973). There the Supreme Court appeared to weaken the "overbreath" doctrine: [T]he overbreath of [the] statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Ibid., at 615. This may signal a modification by the present justices of the Supreme Court of the earlier holdings which allowed prima facie challenges of statutes without the requirement that the overbreath be substantial. See: United States v. Roebel, 398 U.S. 258 (1967); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Dombrowski v. Pfister, 380 U.S. 479 (1965); and Aptheker v. State, 378 U.S. 500 (1964).

[146] The President's Commission on Obscenity supports this type of test and "recommends that federal, state, and local legislation prohibiting the sale, exhibition, or distribution of sexual materials to consenting adults should be repealed." Report of the Commission, p. 51.